Supreme Court, U.S.
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No._____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1997

TT TELEFILM, GmbH, & Co.,

Petitioner

v.

THE MOVIE GROUP, INC., and

INTERNATIONAL MOVIE GROUP, INC.,

Respondents

Petition for Writ of Certiorari to the Supreme Court of the State of California

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether section 204(a) of the Copyright Act, 17 U.S.C. §204(a), which invalidates oral transfers of exclusive rights in copyrighted works, precludes a party who claims to have acquired an exclusive right to a copyrighted work by oral transfer from enforcing a subsequent contract to transfer that exclusive right to a third party or whether such a contract is enforceable as the California State Courts below held?

II. Whether under prior rulings of this Court unclear State procedural practices can be invoked to support a holding that a civil defendant has waived important Federal defenses to a claim?

PARTIES TO THE PROCEEDING

TT Telefilm, GmbH & Co., Defendant/Petitioner
The Movie Group, Inc., Plaintiff/Respondent
International Movie Group, Inc., Plaintiff/Respondent

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

This petition seeks review of the September 17, 1997 denial of a petition for review by the California Supreme Court (unpublished)(App.1a) which denied review of the June 27, 1997 decision issued by the Second Appellate Division of the California Court of Appeal (App. 3a)(unpublished), which affirmed the December 1, 1995 Statement of Decision of the California Superior Court for Los Angeles County (App. 19a).

STATEMENT OF JURISDICTION

In seeking review of the above-referenced denial of a petition for review by the California Supreme Court which denied review of the decision of the California Court of Appeal, petitioner invokes certiorari jurisdiction conferred on this Court by 28 U.S.C. §1257.

STATUTES INVOLVED

Section 204(a) of the Copyright Act, 17 U.S.C. §204(a), provides in relevant part:

> **(a)** A transfer of copyright ownership, other than by operation of law, is not valid unless an instrument of conveyance, or a note or memorandum of the transfer, is in writing and signed by the owner of the rights conveyed or such owner's duly authorized agent.

INTRODUCTION

Section 204(a) of the Copyright Act establishes a simple but fundamental rule - title to an exclusive right in a copyrighted work can only be transferred by a writing signed by the grantor or its agent. In the instant action, the state courts of California enforced two motion picture license agreements in favor of a licensor which admitted at trial that it had not obtained title by a signed written instrument. Furthermore, the parties to the chain of title preceding one of the license agreements admitted in sworn testimony in foreign proceedings that the rights that the licensor purported to transfer to Petitioner had never been transferred to the licensor. The state courts below

refused to consider Petitioner's challenge to the licensor's title on the sole ground that the issue had not been raised as a separate affirmative defense in Petitioner's answer to the complaint. The courts below thereby subordinated substantive, Federal, statutory rights to unclear state procedural rules. The issue of title to copyrighted works is one which arises frequently in copyright actions and in contract actions relative to copyrighted works. This Court should grant *certiorari* to establish clearly the standards which apply to section 204(a) writings and the procedural limitations which courts can impose on a litigant's right to raise a Federal issue.

STATEMENT OF CASE

Petitioner, TT Telefilm, GmbH & Co. ("TT Telefilm"), is a German entity which is in the business of licensing motion pictures to television stations and others in the German speaking territories of Europe. Respondents, The Movie Group, Inc., and International Movie Group, Inc., (collectively "TMG"), are U.S. based corporations engaged in the business of licensing motion pictures to entities such as TT Telefilm. (App. 4a)

This case arises out of two written exclusive licenses from TMG to TT Telefilm, executed in 1990 and 1991, for the distribution of motion pictures in identified German-speaking territories in Europe.[1] (App. 4a-5a).

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[1] These motion pictures were copyrighted in the United States. Both licenses were executed in California and stipulated that California law would apply.

Various disputes regarding film quality, delivery schedules, and payment developed during 1991-92. (App. 6a) This contract action was filed in Los Angeles County Superior Court in late 1992.

With respect to the first license agreement in issue, known as the Four Film Agreement, in 1989, prior to contracting with TT Telefilm ,TMG entered into a written exclusive, long-term license for the same films to VCL/Virgin Communications GmbH ("VCL") one of TT Telefilm's competitors in Germany. (App. 4a) In 1989, VCL in turn, exclusively sublicensed at least two of the same films in the same territory to another German company, Capitol Film & TV International GmbH ("Capitol").

Peter Strauss, President of TMG and TMG's only witness, admitted at trial that TMG had recovered the movie rights from VCL solely by virtue of an oral agreement. (App. 5a) No written agreement for the return of such rights by VCL to TMG was ever produced or claimed. This purported oral agreement was the only basis for TMG's claim that TMG had the right to enter into the Four Film Agreement with TT Telefilm. The validity of this claim is a critical focus of the instant Petition.

Moreover, TMG did not attempt to introduce any evidence at trial which demonstrated that VCL ever recovered the film rights from its sublicensee, Capitol. This was a second vital omission which concealed the facts that Capitol had never at any time since 1989 agreed to retransfer the film rights to VCL and that VCL in turn

had never at any time since 1989 agreed to retransfer them to TMG. These facts are conclusively established in sworn statements of TMG, VCL, and Capitol filed in German court proceedings in 1993 which TT Telefilm discovered only shortly before the trial of the instant action. In other words, an actual fraud was perpetrated upon TT Telefilm in the making of the Four Film Agreement and upon the California courts in enforcing the Agreement.

The California courts refused to consider the Copyright Act's application to the asserted oral agreement and also refused to consider or to permit discovery concerning the admissions of absence of title. (App. 8a-9a) The subsequent judgment, which enforced the exclusive licenses of films to which the licensor TMG admittedly lacked title, worked a manifest injustice upon TT Telefilm. This injustice is a direct consequence of the trial court ignoring the mandate of the Copyright Act that the rights claimed by a licensor such as TMG must be in writing and signed by the grantors - here VCL and Capitol.

The details of this actual fraud are as follows: In 1993, after TMG terminated the Four Film Agreement, VCL and TMG brought the equivalent of an *ex parte* temporary restraining order proceeding in Germany against a broadcaster who had been sublicensed by TT Telefilm before the termination of the Four Film Agreement to broadcast of one of the films, "Bed and Breakfast." Mr. Ruth, VCL's principal, submitted a sworn statement to the German court that Capitol had

acquired exclusive the rights from VCL, and that VCL had never recovered them from Capitol. Mr. Strauss, TMG's principal, also submitted a sworn statement supporting the German action. In a 1995 sworn statement to Police Department West, Hamburg, Germany, Criminal Investigative Division, Mr. von Halem, Capitol's principal, confirmed that Capitol had never, from 1989 through at least 1995, returned the film rights to VCL. (App.7a-8a)

The German restraining order was served the day before the scheduled broadcast, and the broadcaster was therefore forced immediately to settle with VCL. VCL then withdrew the action, which had the effect under German law of sealing the court files. Consequently, in 1993, TT Telefilm, which was not a party in that action, was not aware of the admissions contained in the filings.[2] It was not until the summer of 1995, just before commencement of trial herein, that these filings were obtained by TT Telefilm from a German prosecutor who was investigating VCL. Thus, in 1995, it became clear to TT Telefilm that TMG knew it had never reacquired title to these copyrighted works but had still deliberately entered the Four Film Agreement with TT Telefilm.

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[2]TMG, on the other hand, knew of the German court proceeding because it was a plaintiff in that case, but TMG failed to disclose information or produce documents regarding it during discovery even though such matter was within the scope of TT Telefilm's general discovery requests.

The instant law suit was filed in late 1992, and TT Telefilm filed its answer in early 1993. The complaint alleged, as it must, that TMG had fulfilled all of its contractual obligations to TT Telefilm and that TT Telefilm had breached the contracts by not paying the contract price. Under the contracts, TMG had three obligations: (1) to convey good title; (2) to deliver films of proper technical quality; and (3) to deliver the films by certain specified dates. TT Telefilm's answer was a general denial of the allegations of the complaint; this had the effect of putting in issue all of the claims in the complaint.

TT Telefilm did not raise the oral contract issue and the resulting invalidity of the contracts as a defense in the answer because at that time it had no knowledge of the facts. TT Telefilm did not obtain the evidence concerning this actual fraud until shortly before trial.

At trial, TMG alleged that it had relied on an oral agreement with VCL to recover the rights to the films licensed to TT Telefilm, and it admitted that it had not recovered the exclusive rights to the films in a writing. (App. 5a) This fact alone should have been sufficient to defeat its contract claims at trial under the written agreement mandate of the Copyright Act.

Moreover, at trial no writing could have been produced because TMG in fact never recovered the rights from VCL, and VCL never recovered them from Capitol. This was no technicality; TMG knew or should have known it had not obtained the rights, and it repeatedly

committed actual fraud by making diametrically opposing representations on the subject of ownership in different court proceedings.

At trial, TT Telefilm repeatedly attempted to raise the oral contract issue and the issue that previously TMG had exclusively licensed at least two of these same films to a competitor of TT Telefilm and had never recovered the exclusive rights before purporting to license them to TT Telefilm. Accordingly, TT Telefilm sought to establish at trial that TMG did not perform, and could not have performed, its essential obligation under the contracts for which it was seeking damages in this action. Without a valid transfer of such exclusive rights, TT Telefilm could not legally conduct its normal business of sublicensing such films to television stations and other exhibitors. During the trial, TT Telefilm moved for a continuance to conduct discovery concerning the contrary admissions and evidence in the German proceedings, and moved for dismissal of TMG's causes of action for failure to demonstrate performance (transfer to TT Telefilm of good title) under the Copyright Act. These motions were denied. (App. 8a)

In its December 1, 1995 Statement of Decision,, the Superior Court held that the Four Film Agreement was valid and had been breached by TT Telefilm. The Superior Court did not consider or rule upon the issues of title, and awarded TMG damages of over $300,000 for breach of the Four Film Agreement by TT Telefilm, by reason of

partial nonpayment of the license fees. (App. 34a)[3] The Superior Court refused to consider the issues of title even though passage of title was the primary purpose of the license agreements. The Superior Court excluded these issues on the grounds that they had not been pleaded in TT Telefilm's Answer or raised in the Final Pretrial Order.(App. 8a).

A similar pattern of purported oral agreements and actual fraud existed with respect to a second exclusive license between the parties, referred to as the Romantic Comedies II Contract ("RC 2 Contract"). In the RC2 Contract, TMG purported to license to TT Telefilm the exclusive rights to six additional films in the same German-speaking territories. TT Telefilm did not discover until after the close of discovery and the Final Pre-Trial Order that TMG never in fact obtained from the producer, Chrysalide Films, societe francais ("Chrysalide"), in writing or otherwise, certain rights which TMG purported to grant to TT Telefilm in the RC2 Contract. (App. 7a-8a)

First, TMG's principal, Mr. Strauss, admitted at trial that TMG had not entered into any contract with Chrysalide to acquire the rights to any of the six RC2 films at the time that TMG executed the RC2 Contract with TT Telefilm. Second, Mr. Strauss also admitted that none of the six films was even in existence at the time the RC2 Contract was entered with TT Telefilm. Indeed, he

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[3]It also allowed TMG to retain over $440,000 which had already been paid by TT Telefilm under the Four Film Agreement.

admitted that none of the films existed even later when TMG finally entered into a license agreement with the producer, Chrysalide. Third, the belated license agreement between Chrysalide and TMG licensed only five films, not six as provided in the RC2 contract with TT Telefilm. According to TMG, its rights to the sixth film were acquired by oral agreement. Finally, the RC2 Contract included Luxembourg in its exclusive territory, a country which TT Telefilm's principal was prepared to testify was a broadcast site which was vital to acquiring and marketing exclusive German-speaking rights. However, the TMG - Chrysalide contract by its terms reserved Luxembourg to Chrysalide.

In its Statement of Decision, the trial court enforced the RC2 contract and awarded TMG $850,000 in damages. (App. 34a) Here too, the trial court denied TT Telefilm's motions and refused to explore the copyright issues. It is a manifest injustice to permit TMG to recover a total of $850,000 plus attorneys fees from TT Telefilm and to retain $350,000 already paid by TT Telefilm on the RC2 Contract when TMG did not own, never delivered, and could never deliver to TT Telefilm all of the rights contracted for in the RC2 Contract.

On June 27, 1997, the Court of Appeal affirmed the Judgment of the Superior Court. (App. 3a-18a) On July 11, 1997, TT Telefilm filed a Petition for Rehearing with the Court of Appeal. On July 15, 1997, the Court of Appeal denied TT Telefilm's Petition for Rehearing. (App. 2a). TT Telefilm then timely filed a Petition for Review

with the California Supreme Court which denied that Petition by Order dated September 17, 1997. (App. 1a).

REASONS FOR GRANTING THE WRIT

I. This Court should resolve the issue of whether Section 204 (a) of the Copyright Act, 17 U.S.C. §204(a), which invalidates oral transfers of exclusive rights in copyrighted works, precludes a party who claims to have acquired an exclusive right to a copyrighted work by oral transfer from enforcing a subsequent contract to transfer that exclusive right to a third party or whether such contracts are enforceable as the California State Courts below have held.

The starting point in any discussion regarding conveyance of title to an exclusive right in a copyrighted work is that the instrument of conveyance must be in writing and must be signed by the grantor or its agent. Section 204(a) of the Copyright Act provides:

> A transfer of copyright ownership, other than by operation of law, is not valid unless an instrument of conveyance, or a note or memorandum of the transfer, is in writing and signed by the owner of the rights conveyed or such owner's duly authorized agent.

All of the various federal courts that have considered section 204(a) have uniformly held that a

transfer of an exclusive right must be in writing.[4] While several courts have held that oral transfers can be retroactively validated[5] and there is also a dispute about the extraterritorial application of U.S. copyright laws,[6] the law is clear that a transfer of an exclusive right in a U.S. copyright which is not in writing is not valid.

Thus, for example, in *Effects Associates v. Cohen*, 908 F.2d 555, 556 (9th Cir. 1990), the Ninth Circuit, construing section 204(a), stated:

> The law couldn't be clearer: the copyright owner of 'a motion picture or other audio visual work' has the exclusive rights to copy, distribute or display the copyrighted work publicly. 17 U.S.C. § 106 (1988). While the copyright owner can sell or license his rights to someone else, Section 204 of the Copyright Act invalidates a purported transfer of ownership unless it is in writing. 17 U.S.C. § 204(a) (1988).

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[4] *Jacob Maxwell, Inc. v. Veeck*, 110 F.3d 749 (11th Cir. 1997); *Bateman v. Mnemonics, Inc.*, 79 F.3d 768 (11th Cir. 1997); *I.A.E., Inc. v. Shaver*, 74 F.3d 768 (7th Cir. 1996); *Playboy Enterprises v. Dumas*, 53 F.3d 549 (2d Cir. 1995); *Konigsberg International, Inc. v. Rice*, 16 F.3d 355 (9th Cir. 1994); *Saxon v. Blann*, 968 F.2d 676 (8th Cir. 1992); *Effects Associates v. Cohen*, 908 F.2d 555 (9th Cir. 1990); *Valente-Kritzer v. Pinckney*, 881 F.2d 772 (9th Cir. 1989).

[5] *Imperial Residential Design, Inc. v. Palm Development, Inc.*, 70 F.3d 96 (11th Cir. 1995); *Eden Toys, Inc. v. Floralee Undergarments Co. Inc.*, 697 F.2d 27 (2d Cir. 1982); *but see Konigsberg, supra.*

[6] *Subafilms, Ltd. v. MGM-Pathe Communications*, 24 F.3d 1058 (9th Cir. 1994); *compare Update Art, Inc. v. Modiin Publishing, Ltd.*, 843 F.2d 67 (2d Cir. 1988).

* * * * *

> Section 204's writing requirement is not unduly burdensome; it necessitates neither protracted negotiations nor substantial expense. The rule is really quite simple: if the copyright holder agrees to transfer ownership to another party, that party must get the copyright holder to sign a piece of paper saying so. It doesn't have to be the Magna Charta; a one line pro forma statement will do.

The Four Film Agreement and the RC2 Contract each specified that California law applied[7] and warranted TMG's good title to the works in question. Thus, in order to transfer an exclusive copyright interest to TT Telefilm, TMG was obligated in connection with the Four Film Agreement to recover title to the works in question by an assignment of rights in writing from VCL which in turn had to recover them from its sublicensee, Capitol. The contract between TMG and VCL had granted an exclusive license to VCL in Germany with respect to each of these four pictures. TMG tried to recover that license back from VCL so that it could sell the television rights in Germany to TT Telefilm. However, any agreement which might have been reached (and the evidence is strong that no agreement, not even an oral one, was ever reached) was admittedly not reduced to writing as required by Section

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[7] Of course, since the Copyright Act preempts state law, *Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989), that Act would govern all copyright issues.

show that the prior sublicensee in Germany, Capitol, ever returned its rights to VCL either verbally or in writing. Therefore, TMG could not convey an exclusive license, or any license for that matter, to TT Telefilm.

In the case of the RC2 Contract, TMG licensed six films to TT Telefilm at a time when it had no rights and no copyrights even existed. Aside from the questions related to the scope of the license (i.e. the non-ownership of rights by TMG at the time of entering the RC2 Contract, five vs. six films, and the absence of rights in Luxembourg), this raises the issues of whether a license can be validated by a subsequent acquisition of rights and whether it is even possible to sell rights to a copyrighted work which does not yet exist.[8]

Thus, if this case had been decided on the basis of clear and unambiguous Federal statutory law, the California courts would have been required to resolve the dispute in favor of TT Telefilm. The only reason given for this refusal to apply Federal law is that the issue was waived because it was not specifically raised in the pleadings as a separate affirmative defense. (App. 9a).

II. Under prior rulings of this Court, unclear State procedural practices cannot be invoked to support a holding that a civil defendant has waived important federal defenses to a claim.

[8]Under sections 101 (definition of "created"), 102 and 302 of the Copyright Act, 17 U.S.C.§§ 101, 102, 302, a copyright is created when a work is "fixed" in a "tangible medium of expression." This raises the question, also raised below, of whether it is possible to transfer an exclusive copyright license in a copyright which does not exist.

As mentioned, the California Court of Appeal refused to consider the issue of the validity of the contract under section 204(a). This refusal was based on a claim that TT Telefilm had waived its rights to assert these claims by not having timely raised them as a separate affirmative defense in the pleadings. (App. 9a).

The appellate court's reasoning was that the issue of whether title had been properly conveyed is an issue of failure of consideration and that failure of consideration is an affirmative defense which must be raised in the answer or waived. Aside from the difficulty of asserting such a defense before discovery of the facts, TT Telefilm contended below that this issue was included within the scope of its general denial. TT Telefilm also pointed out to the California Supreme Court that there is a conflict among the various intermediate California appellate courts and scholars on the question of whether failure of consideration is an affirmative defense, or whether showing fulfillment of contractual obligations is part of the plaintiff's burden of proof.

California law on this issue is best described as confused and confusing. Section 1439 of the California Civil Code provides:

> Before any party to an obligation can require another party to perform any act under it, he must fulfill all conditions precedent thereto imposed upon himself; and must be able and offer to fulfill all conditions concurrent so imposed upon him on the like fulfillment by the other party . .

Section 1550 of the California Civil Code provides:

> It is essential to the existence of a contract that there should be . . .
>
> 4. A sufficient cause or consideration.

A party to a contract "must be free from substantial default in order to avail himself of the remedies" in an action for breach of contract, 1 B.E. Witkin, *Summary of California Law*, § 796 (Contracts) (9th Ed. 1987 & Supp.), and must allege ***and*** prove fulfillment of all contractual requirements or plead excuse for non-compliance. *Bayly v.* Lee, 174 Cal. 137, 139, 162 P. 96 (1916) (plaintiff must do what he is contractually obligated to do before he can maintain an action against adverse party); *Cameron v. Burnham,* 146 Cal. 580, 89 P. 928 (1905); *Fogarty v. Saathoff,* 128 Cal. App. 3d 780, 785; 180 Cal. Rptr. 484 (1982) (a party to a contract cannot "place the other in default unless he is able to perform or tender performance").[9] And, the question of a seller's title to the object which is the subject of the sale is a legitimate subject of inquiry in any action brought by the seller for breach of contract with respect to the sale thereof. *Benson v. Shotwell,* 87 Cal. 49, 25 P. 249 (1890); *Wisniewski v. Morris,* 227 Cal. App.2d 580, 38 Cal.Rptr. 815 (1964).

TMG alleged in the Amended Complaint that it had performed all things required of it under the licenses.

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[9]See also, *Dawn v. Superior Court,* 228 Cal. App. 2d 283, 39 Cal. Rptr. 443(1964); *Pry Corp. v. Leach,* 170 Cal. App. 2d 632, 2 Cal. Rptr. 425 (1960); *Kossler v. Palm Springs Developments, Ltd.,* 101 Cal. App. 3d 88, 99, 161 Cal. Rptr. 423 (1980); *Brant v. Bigler,* 92 Cal. App. 2d 730, 208 P.2d 47 (1949)

This, of course, included the obligation to transfer to TT Telefilm good title to the rights assigned in the licenses which is the very essence of a motion picture license. TT Telefilm, in its answer, generally denied these allegations and thereby put TMG to the proof required of plaintiffs by law. Nothing further was required.

This was in accord with the California Code of Civil Procedure, commentary, and decisions in at least the Third and Fourth California Appellate Districts. Section 431.30(b), Cal. Code Civ. Proc., states that:

> The Answer to a complaint shall contain:
>
> (1) The general or specific denial of the material allegations of the complaint controverted by the defendant.
>
> (2) A statement of any new matter constituting a defense.

"New matter" is, in essence, any ground urged by defendant in *avoidance* of the complaint, that is, some independent reason why the plaintiff should not recover, even if everything alleged in the complaint is true. *Carranza v. Noroian*, 240 Cal.App. 2d 481, 485-86, 49 Cal.Rptr. 629, 632-33 (1966); *FPI Development, Inc. v. Nakashima,* 231 Cal. App. 3d 367, 383-84, 282 Cal.Rptr. 508, 527 (1991); *see* Weil and Brown, California Practice Guide: *Civil Procedure before Trial* (TRG 1997) Section 6:430, p. 6-86. Weil and Brown state:

> But failure of conditions (non-performance or defective performance) is not "new matter"...because plaintiff bears the burden of pleading and proving performance in a

> contract action. Hence, simple lack of performance is in issue under a simple denial of plaintiff's allegation of "performance" in the complaint.

Thus, a general denial puts in issue the question of whether there is a *failure of consideration* (failure to execute the bargained for promise). *FPI Development, Inc. v. Nakashima*, 231 Cal App. 3d. at 383. Weil and Brown, *supra*, *Civil Procedure before Trial* (TRG 1997) Section 6:440, p. 6-88.

In *FPI Development,* an appeal of a summary judgment motion in an action on a promissory note, the California Third Appellate District ruled that the defendant's "general denial had put in issue the material allegations of the complaint." *Id.* At 393 It noted that, "[w]hat is put in issue by the denial is limited to the allegations of the complaint", and it held that "[i]f there is a triable issue of fact as to matters put in issue by the general denial, defendants are entitled to reversal of the summary judgment."*Id.* At 385.[10]

Similarly, in *Rancho Santa Fe Pharmacy, Inc. v. Seyfert*, 219 Cal.App. 3d 875, 368 Cal.Rptr. 505 (1990), the California Fourth Appellate District held that the submission of a written guarantee by a plaintiff suing on a note triggered the presumption of consideration set forth in Sections 1614 and 1615 of the Civil Code. The court held that, pursuant to these Sections, and Sections 601-605 of the Evidence Code, this presumption related to a

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[10]*See also, Rodenberry v. Rodenberry,* 44 Cal. App. 4th 634, 654, 51 Cal. Rptr. 2d 907 (1996) ("basic rule is that a party must prove what the party must plead.")

burden of producing evidence as to consideration for the guarantee, but it did not shift the burden of proof on the issue of consideration for the guarantee which always rests on the plaintiff. Thus, once the plaintiff produced a written instrument, the presumption of consideration came into play, but when

> ...the party against whom the presumption operates produces some quantum of evidence casting doubt on the truth of the presumed fact, the other party is no longer aided by the presumption. The presumption disappears leaving it to the party in whose favor it initially worked to prove the fact in question.

219 Cal.App. 3d at 882; 368 Cal.Rptr. at 509.

Thus, under one line of California cases and interpretation of California procedural rules, TT Telefilm's general denial of TMG's allegation of due performance in the instant case was sufficient to put the title questions into issue since the transfer of title in the exclusive license was the essence of the "performance." Characterizing this non-performance as a "failure of consideration" does not change the issues or the burdens.

However, the trial court flatly refused to consider any of the title issues. It ruled that since they weren't specifically asserted in the original Answer or the Final Pretrial Order, they could not be addressed. The trial court thereby deprived TT Telefilm of the right to introduce the "quantum of evidence" of non-performance which would defeat the presumption of consideration in a written instrument. More importantly, TT Telefilm was

deprived of the opportunity to establish that a fraud was being perpetrated it and upon the court and that it was being required to pay very substantial amounts of money for movie rights which TMG did not and could never have transferred to TT Telefilm.

The Court of Appeal affirmed the lower court's decision in reliance upon a conflicting line of authority:

> Failure of consideration, which is apparently what appellant is arguing, is an affirmative defense which should have been raised in the pleadings. (*Williams v. Kinsey* (1946) 74 Cal.App.2d 583, 603; *Niederer v. Ferreira* (1983) 150 Cal.App.3d 219, 224.) The trial court has broad discretion to refuse to allow the introduction of new legal theories into a trial by either a plaintiff or a defendant, where it would prejudice the other party to do so. (*Trafton v. Youngblod* (1968) 69 Cal.2d 17, 31-32; *City of Stanton v. Cox* (1989) 207 Cal.App.3d 1557, 1563.)

(App. 9a).[11] *Williams, supra*, follows *Pastene v. Pardini,* 135 Cal. 431, 67 P. 681 (1902), as do such Second Appellate District cases as *Elster's Sales v. Longo,* 4 Cal. App.3d 216, 84 Cal. Rptr 83 (1970), and *Fairlane Estates, Inc. v. Carrico Construction Co.*, 228 Cal. App. 2d 65, 39 Cal. Rptr. 35 (1964). (lack of consideration for a written contract is not available as a defense unless specially

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[11]The appellate court speculated that TT Telefilm was not harmed by this breach of contract on the part of TMG. (App. a9). However, as the primary purpose of the conracts was to pass title to the films, TMG's lack of title totally vitiates them.

pleaded). Thus, the sole justification for exclusion of title issues was their characterization as affirmative defenses.

This raises the important question of whether a defendant in a state civil trial can be held to have waived an overriding, substantive, statutory, Federal right by virtue of non-compliance with conflicting and confusing state procedural practices. In other words, should a state court be allowed to decide a case based on a preference for State procedural rules over a substantive Federal law, a preference for court rules over explicit statutory law, and a preference for procedure over substance.

It is beyond dispute that a litigant must raise objections and issues at trial or waive them, and that parties to both civil and criminal proceedings may knowingly waive rights granted to them by federal or state statutes or constitutions. *Yakus v. U.S.*, 321 U.S. 444(1944); *Freytag v. Commissioner of Internal Revenue,* 501 U.S. 868, 878(1991)(generally, a litigant must raise issues and objections at trial).[12] However, on many occasions this Court has held that such waivers must be knowing and intentional (e.g. those made for

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[12] In *Murray v. Carrier,* 477 U.S. 478, 488 (1986), this Court noted that an inadvertent waiver of a right which occurred because facts necessary to raise the objection were not reasonably available to counsel would constitute cause for a grant of habeas relief. And, in *Johnson v. Zerbst,* 304 U.S. 458 (1938), the Court held that to be effective a waiver must be of a known right or privilege. In the instant case, counsel who formulated the answer could not have known at that time that TMG had obtained the rights transferred to TT Telefilm by oral transfer. This was not learned until nine months later, and thus the facts were not reasonably known to TT Telefilm at the time that the court of appeal said the issue needed to be raised.

tactical reasons) and not inadvertent. *Fay v. Noia*, 372 U.S. 391 (1963); *Brookhart v. Janis*, 384 U.S. 1, 4 (1966) ("there is a presumption against the waiver of constitutional rights...and for a waiver to be effective it must be clearly established that 'there was an intentional relinquishment or abandonment of a known right or privilege.'"); *Pence v. Langdon,* 99 U.S. 578, 581 (1878) ("Acquiescence and waiver are always questions of fact."). Such holdings are most common in the criminal law sphere, *Fay, supra, Brookhart, supra,* but they have been extended into the area of civil litigation as well. *Curtis Publishing Co. v. Butts,* 388 U.S. 130 (1967);[13] *Head v. New Mexico Board of Examiners,* 374 U.S. 424 (1963) (failure to raise argument in lower courts will result in a waiver).

While most cases involve waiver of constitutional rights, there is no reason why these considerations do not apply to rights granted by federal statute. *Bybee v. Oregon & California Railroad Co.,* 139 U.S. 663, 681 (1891). (railroad that received title to land by Act of Congress is not estopped to assert that right by fact that it paid third party for an easement over the land.) This is particularly true of copyright law. This Court has held that in the Copyright Act of 1976 Congress occupied the

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[13]In *Curtis* no constitutional defense along the lines of *New York Times v. Sullivan*, 376 U.S. 254 (1965), was made at trial even though counsel knew that the issue was pending in this Court. The Fifth Circuit held that the constitutional issue had been waived for this reason. This Court held that there was no prejudice to the plaintiff from the failure to raise the constitutional issue at trial because it was raised on appeal. Here, of course, the issue of the applicability of section 204(a) was raised at trial.

entire area and preempted any state action regarding copyrights. *Community for Creative Non-Violence v. Reid,* 490 U.S. 730 (1989).

Thus, it is clear that this is an area in which Congress has used its powers under the Constitution to preempt the entire area, and its law reigns supreme. In connection with the passage of title to exclusive rights in copyrighted works, Congress has decreed that such rights may be transferred only by a written instrument signed by the grantor. The purpose of this preemption is to prevent fraud and promote uniformity of law throughout the United States. When local practices of the various states prevent application of the provisions of section 204 to specific transactions those rules interfere with the Congressional plan of intent and frustrates the uniform application of the law. While the rights that a litigant has under section 204 can knowingly be waived, the national interest is clear that there should not be situations under state law where this protection is waived inadvertently because state procedural rules are less than clear.

This is exactly what happened here. In this case, various California courts and scholars have reached different conclusions about whether the issue of lack of title in a contract to convey title is an affirmative defense as the courts below held or an affirmative obligation of proof for the plaintiff.[14] It is particularly unfair to have such a pleading rule when the information on this issue

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[14]This Court has held that in copyright infringement cases the issue of ownership is always part of the plaintiff's burden of proof. *Feist Publications, Inc. v. Rural Telephone Service Co.,* 499 U.S. 340 (1991).

is totally in the hands of the plaintiff and the defendant is unaware of the title problem at the time it files its answer.[15] TT Telefilm through no fault of its own was caught in this confusion and was held to have sacrificed this right without any forewarning.

Consequently, petitioner submits that this Court should hold that such federal rights may not be waived by inadvertence but only pursuant to clear rules and practices.

CONCLUSION

For the reasons stated herein, it is respectfully requested that this Court grant Respondent TT Telefilm's Petition for a Writ of Certiorari.

Respectfully submitted,

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[15] "There can be no irrevocable estoppel when the truth has been withheld." *Buffum v. Barceloux Co.*, 289 U.S. 227, 235 (1933).

Second Appellate District, Division Five, No. B099715
SO63399
IN THE SUPREME COURT OF CALIFORNIA

THE MOVIE GROUP INCORPORATED Et Al.,
Respondents

v.

GMBH, & COMPANY TT TELEFILM, Appellant

Appellant's petition for review DENIED.

/MOSK/

Acting Chief Justice

OFFICE OF THE CLERK
COURT OF APPEAL
STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT
JOSEPH A. LANE, CLERK

DIVISION: 5 DATE: 07/15/97

Bruinsma & Hewitt
Michael C. Hewitt
25431 Cabot Road
Suite 202
Laguna Hills, CA. 92653

RE: Movie Group, the
VS.
Tt Telefilm
2 Civil B099715
Los Angeles NO. BC066615

THE COURT:

PETITION FOR REHEARING DENIED.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION FIVE

THE MOVIE GROUP, INC., et al.,

Plaintiffs and Respondents,

v.

TT TELEFILM, GMBH, & CO.,

Defendant and Appellant.

B099715

(Super.Ct.No.BC066615)

APPEAL from a judgment of the Superior Court of Los Angeles County. Edward Y. Kakita, Judge. Affirmed.

Bruinsma & Hewitt, Dirk Bruinsma, Michael C. Hewitt, Richard J. Chaifetz, J. Lawrence Blades, for Defendant and Appellant.

Greenberg, Glusker, Fields, Claman & Machtinger, Charles N. Shephard, Roger L. Funk, for Plaintiffs and Respondents.

TT Telefilm appeals from a judgment entered against it and in favor of respondents The Movie Group, Inc. ("TMG") and International Movie Group, Inc. ("IMG") on respondents' complaint, after court trial. We affirm the judgment.

Factual Summary[1]

Respondents[2] are motion picture distributors who obtain rights to motion pictures and license those rights to foreign distributors. Appellant is a German motion picture distributor which licenses rights from other companies and sublicenses those rights to video companies and television stations. Respondents and appellant entered into several contracts in which appellant obtained rights to broadcast or exhibit films in Germany and German-speaking countries. Two of those contracts, dated October 1990 and May 1991, gave rise to this litigation. Respondents' complaint alleged that appellant breached the contracts by failing to pay sums due.

In brief, in the October 1990 contract respondents licensed to appellant the television rights in German-speaking Europe, as defined, to four films, titled "Bed and Breakfast," "Best of the Best," "Perfume of the Cyclone," and "Buried Alive," for a license fee of $880,000. Respondents had originally licensed the relevant rights to these films to VCL, a competitor of appellant. However, at the 1990 Cannes film market, Herbert

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[1]We note that in preparing this summary, we were poorly assisted by appellant, which filed an opening brief with erroneous citations to the record and did not fully correct those errors in its subsequent amended brief.

[2]The Movie Group, Inc. is a wholly owned subsidiary of International Movie Group, Inc.

Jovy, on behalf of appellant, asked Peter Strauss, President and Chairman of the Board of both TMG and IMG, if respondents had any product which appellant could license. Strauss replied that the rights to available product had already been licensed to VCL, but that he might be able to re-license the rights. Jovy encouraged him to do so. Strauss reached an oral agreement with VCL which allowed him to license the four films to appellant.

The May 1991 contract concerned theatrical and television rights in German-speaking Europe to six films. The films, which had not yet been made, were to be romantic comedies produced by respondents and Chrysalide Films. The films were to be similar in casting, script, and budget to several other films previously produced by Chrysalide and licensed to appellant by respondents. The films were identified as "TBA one" through "TBA six." The license fee was $1.5 million.

Appellant's answer included a general denial and several affirmative defenses. In pertinent part, appellant alleged that respondents breached the May 1991 agreement by refusing to allow appellant to participate in casting, script, and similar decisions, by failing to timely deliver the films, and by other acts or omissions not then known to appellant. In addition, appellant alleged that the term "TBA" in the 1991 agreement meant "to be agreed," obligating respondents to obtain appellant's agreement on the identity of the pictures, and that respondents had repudiated that obligation. Appellant filed a cross-complaint for breach of contract, making essentially the same factual allegations as those in the answer.

Trial was set for January 31, 1994. On January 7, 1994, the parties filed a status conference report listing, inter alia, all witnesses and exhibits. Trial was then continued numerous times, and actually began on October 11, 1995. After a ten-day court

trial, the court entered judgment in favor of respondents on both the complaint and the cross-complaint and awarded respondents the unpaid balance of the contract prices, adjusted by the amount by which respondents had mitigated damages.

The court issued a lengthy statement of decision. The court found first that the individuals who negotiated the contracts were "extremely experienced" in the motion picture distribution business. Those individuals were, for respondents, Peter Strauss and Daniel Marquet, respondents' head of sales; and for appellant, Herbert Jovy.

On the cause of action for breach of the 1990 contract, the court found that respondents fully performed. The court rejected appellant's defenses, which were that the films were not timely delivered and that there were physical problems with the print of "Bed and Breakfast". The court found that delivery was timely and that any physical problems with the films were within the norm and were timely cured. Appellant had also contended that respondents breached the contract because the German government had restricted the broadcast times of "Buried Alive" due to its violent content. The court found that appellant was aware prior to signing the contract that the film might be subject to censorship, and that the contract did not call for a discounted price in that event.

On the cause of action for breach of the May 1991 contract, the court found that respondents had complied with their obligations and were not in breach, and that there was no justification for appellant's refusal to pay sums due. The court rejected appellant's argument that the contract was merely an "agreement to agree" and was too uncertain to be enforced. In response to appellant's argument that respondents breached by refusing to allow appellant to approve or reject any or all of the films, or to participate in script, casting, and similar decisions, the

court found that the contract did not give appellant those rights, and the "TBA" meant "to be announced", not "to be approved". The court found that the delivery dates in the contract were estimates, and rejected appellant's argument that respondents had breached by failing to deliver the films on the those dates.

As to each cause of action, the court found that Jovy, the sole witness for appellant, was not a credible witness.

Discussion

1. Proof of Title

Appellant contends that the trial court erred in finding for respondents on both contracts because the contracts required respondent to convey good title, because respondents did not establish that they had the rights conveyed in the contracts, and because respondents did not in fact have those rights.

Specifically, appellant argues that respondents received the rights to the October 1990 films and one of the May 1991[3] films through oral agreement, and that under copyright law and the statute of frauds an oral agreement is insufficient to convey the rights respondents later purported to license to appellant. Appellant also argues that respondents had no rights to the October 1990 films because respondents' agreement with VCL was incomplete, as evidenced by the fact that VCL and respondents later litigated questions relating to license fees, and because respondents produced no evidence that VCL's

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[3]Here, appellant argues that the contract between respondents and Chrysalide concerns only five films, so that respondents' rights to one film were acquired by oral agreement.

sublicensee returned the right to VCL. Appellant argues that respondents had no rights to the May 1991 films because the contract between Chrysalide and respondents was not signed until after the contract between appellant and respondents; because Chrysalide retained the Luxemborg rights[4] to the films, which respondents purported to license to appellant; because respondents' contract with the producers did not give respondents the right to license the films; and because it was TMG which contracted with Chrysalide and IMG which contracted with appellant.

With one exception (the argument concerning the relationship between IMG and TMG, discussed later in this opinion), the trial court did not make rulings on any of these theories. Appellant alleges, essentially, that the trial court erred by precluding it from raising these defenses and introducing relevant evidence. In support, appellant cites the trial court's denial of its motion to amend its exhibit list and its motion to amend its cross-complaint. Neither motion appears in our record, so the import of the rulings is unclear. It is clear, however, from our own examination of the record, that the trial court excluded from evidence some documents not identified before trial and rejected at least some defenses not included in the pleadings. For instance, in ruling on documents which appellant alleged related to the claim that respondents did not establish title to the six romantic comedies, the court ruled, "If they're [the defenses] not

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[4]Appellant also contends that the court erred by excluding evidence regarding the importance of those rights. We note that the court allowed appellant to question Strauss about the rights, but ruled that only a representative of Chrysalide could testify to Chrysalide's understanding of the contract. Appellant makes no argument that that ruling was in error, and we thus find no error.

in the answer to the complaint, [they're] not going to be asserted."

To the extent that the court rejected these defenses, we see no error. Failure of consideration, which is apparently what appellant is arguing, is an affirmative defense which should have been raised in the pleadings. *(Williams v. Kinsey* (1946) 74Cal.App.2d 583, 603; *Niedreer* v. *Ferreira* (1983) 150 Cal.App.3d 219, 224.) The trial court has broad discretion to refuse to allow the introduction of new legal theories into a trial by either a plaintiff or a defendant, where it would prejudice the other party to do so. *(Trafton* v. *Youngblood* (1968) 69 Cal.2d 17, 31-32; *City of Stanton* v. *Cox* (1989) 207 Cal.App.3d 1557, 1563.) Here, trial took place three years after the complaint was filed. The parties engaged in extensive discovery, including depositions in Europe. When appellant first raised issues concerning proof of title, in opening statement, respondents vigorously argued that they were surprised by the new theory and that they were prejudiced, since a response would require them to call witnesses from VCL and Chrysalide who had not been subpoenaed and to cross-examine appellant's witnesses on areas which had not been the subject of discovery. We see no abuse of discretion in the trial court's ruling.

We note, too, that the failure to raise these issues in the lawsuit suggests a question about the materiality of any breach on respondents' part. Appellant does not contend that the actual copyright holder advanced any objection to the transactions between appellant and respondents, or to any transactions between appellant and its sublicensees. The only suggestion of harm is found in appellant's argument regarding documents excluded by the trial court ruling, which appear in our augmented record. Those documents are apparently pleadings in a 1993 lawsuit in Germany in which VCL sued appellant's sublicensee, blocking release of "Bed and Breakfast". However, the record

indicates that the lawsuit took place after appellant had rejected that film on the pretext that the print was defective, after respondents had offered to buy the film back from appellant, after respondents had told appellant not to sublicense the film, after respondents informed appellant that it was in breach of the contract, and after respondents had re-licensed the film to VCL. The records thus have no relevance.

As we have noted, the court did allow appellant to advance its theory that IMG, which signed the 1990 agreement with appellant, had no rights because it was TMG which contracted with the producers of the films. On this subject, the court specifically found that, "In the normal course of their business, TMG and IMG acquired motion picture distribution rights from various production entities. Thereafter, TMG and TMG entered into contracts with foreign subdistributors. There was an agreement in effect between IMG and TMG pursuant to which each could deal in and act as an agent for other in connection with the motion picture distribution rights which they respectively acquired. The decision as to whether motion picture distribution rights would be licensed to subdistributors in the name of IMG or TMG was based upon internal tax and financial considerations. Although one of the contracts which is at issue was in the name of IMG and one of the contracts which is at issue was in the name of TMG, there is no need to view them separately for purposes of this proceeding." Appellant advances no legal argument to challenge this finding. We can only construe appellant's argument as a challenge to the sufficiency of the evidence. Presuming, as we must, in favor of the judgment, we find sufficient evidence for the court's finding in Strauss's testimony on this subject. (*Crawford* v. *Southern Pacific Co.* (1953) 3 Cal.2d 427.)

Appellant seems to argue that the court erred in excluding from evidence contracts between TMG and the producers of two

of the 1990 films, which provided that TMG could nor assign or convey its rights without written consent. It is apparent, however, that the court allowed appellant to use the documents to impeach Strauss, that the court allowed appellant to use the documents to refresh Strauss's recollection, and that Strauss testified that the contracts contained anti-assignment clauses. Appellant makes no argument that, given this testimony, the exclusion of these contracts was in any way prejudicial.

2. Timely delivery of commercially acceptable prints: the October 1990 Agreement.

Appellant contends that respondents breached the agreement by failing to timely deliver materials suitable for the very high technical standards of German television. On this issue, the court found that "Physical film materials for each of the four films were delivered to [appellant] in a timely manner in conformity with the custom and practice of the motion picture industry. To the extent that there were problems with the initial physical materials provided by IMG, such problems were within the norm of what can be expected when physical film materials are delivered and all such problems were timely cured in a sufficient manner so that all four films were capable of being broadcast on German television. There has been no material (or any other) breach of contract by IMG". The court specifically found that "Bed and Breakfast" was broadcast in Germany using the materials provided by respondents. The court noted that appellant did not produce testimony from any German television station that the quality of "Bed and Breakfast" was inadequate, and that "the Court believes that [appellant's] claim to IMG that the physical quality of 'Bed and Breakfast' made it 'unacceptable' for broadcast in Germany was false and was made by [appellant] in order to try to improperly and without justification induce IMG to provide [appellant] with a discount in connection with the license fee for this film."

We find sufficient evidence for the finding in Strauss's[5] testimony that while several of the films had small flaws, such problems were common in the industry and were timely corrected, so that they had no effect on appellant's arrangements with its sublicensees. Appellant cites evidence to the contrary, but since we presume in favor of the judgment, the fact that evidence was controverted is of no moment.

Appellant argues that the court erred in excluding evidence that in California litigation between respondents and VCL, respondents represented that "Bed and Breakfast" had a technical flaw which rendered it useless in German markets.[6] That evidence is a status report in which the parties recite that a sublicensee of VCL had not paid VCL, due to "technical difficulties" involving the master of "Bed and Breakfast." Again, appellant does not provide argument or citation to the record which would allow us to conclude that the court excluded this document. However, this document is obviously collateral to the issues in the case, and could not change our finding on appeal: there could have been no error in excluding it.

3. Timely delivery: the May 1991 Agreement

Appellant alleges that the court erred by finding that respondents were not in breach of this agreement, because the evidence established that respondents failed to timely deliver the films. We quote the trial court's findings on this subject: "The

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[5]The court allowed Strauss to testify as an expert witness on the foreign licensing of motion pictures.

[6]The flaw in "Bed and Breakfast" was in the last seven or eight seconds of the film. For those seconds, the negative did not produce a bright enough image.

'delivery' and/or 'availability' dates specified [in] the contract were, given the custom and practice of the industry, estimates only. Even if they were not estimates, the failure to have delivered the films by the specified dates does not excuse [appellant's] obligation to pay TMG. This is because there is no indication on the face of the contract that time was of the essence, nor is there any indication from the conduct of the parties that the time for delivery or availability was of any material concern to anyone. To the contrary, the parties' conduct clearly demonstrates that the dates specified. . . were not significant or important. In this regard, [appellant] never complained or protested when the delivery and availability dates came without the films being delivered or made available. Moreover, [appellant] continued to make additional payments to TMG after even after many of the delivery dates had passed. Thus, even if the failure to provide the films by these dates was a breach, it was a non-material breach. Further, until such time as [appellant] made the final payments specified in. . . the contract, TMG had no obligation to deliver films to [appellant]. [Appellant] never made these payments."

Appellant argues that the court erred in admitting Strauss's expert testimony that the custom and practice in the industry was that a delivery date in a pre-sale contract was an estimated date, since the vagaries of production made certainly impossible, and that if a delivery date on a presale contract was not to be an estimate, the parties included a "time is of the essence" clause. However, appellant makes no argument regarding the court's findings on materiality of the breach or on TMG's obligation to deliver the films when appellant had not paid. Since appellant has not presented any grounds of error on those points, the trial court's findings stand. (*In re Marriage of Ananeh-Firempong* (1990) 219 Cal.App.3d 272, 278.) Analysis of appellant's evidentiary argument is unnecessary, since its resolution would not lead to the relief appellant seeks.

4. Uncertainty: The May 1991 Agreement

Appellant argues that the May 1991 contract was not an enforceable agreement because the films had not yet been produced "or created to any degree."

Under basic contract law, "[a]n offer must be sufficiently definite, or must call for such definite terms in the acceptance that the performance promised is reasonably certain." (1 Witkin, Summary of Cal. Law (9th ed. 1987) Contracts, § 145, p. 169, citing Rest.2d Contracts, § 33.) A contract is unenforceable where it is "'so uncertain and indefinite that the intention of the parties in material particulars cannot be ascertained. . . ' [Citations.] To be enforceable, a promise must be definite enough that a court can determine the scope of the duty and limits of performance must be sufficiently defined to provide a rational basis for the assessment of damages." (*Ladas* v. *California State Auto. Ass'n* (1993) 19 Cal.App.4th 761, 770.) Whether a contract term is sufficiently definite to be enforced is a question of law for the court. (*Ersa Grae Corp.* v. *Flour Corp.* (1991) 1 Cal.App.4th 613, 623.)

On this subject, the trial court found, "The court does not accept [appellant's] argument that the contract was an 'agreement to agree' or that the contract was too uncertain to be enforced. The parties knew what was being licensed — distribution rights to six motion pictures which would be produced by Chrysalide in its second package of romantic comedies. Such an agreement, given the custom and practice of the motion picture industry, is sufficiently certain to be enforced. Motion pictures are often sold or licensed before they are identified. Moreover, there was nothing to be agreed upon in the future. [Appellant] was required to accept each of the six motion pictures which were produced by Chrysalide in the second

package of romantic comedies." The court also found that "The Court believes that [appellant] entered into this contract fully aware of what it was acquiring. It did so based upon the success of the first package of romantic comedies which were produced by Chrysalide and which it had licensed. It further did so because it did not want its competitor (VCL) to receive the rights and because it had a standard of protection in that the motion pictures would, at a minimum, satisfy the standard of [French pay tv]." The court further found that the German market for romantic comedies declined after appellant and respondents entered into the May 1991 contract, and that due to the declining market, appellant attempted to negotiate, then terminate, the contract without justification.

Appellant's challenge to this finding is based on a legal theory which beings with the assertion that under federal law, there can be no copyright in a work which does not yet exist. Appellant then argues that a copyright is a "necessary predicate" for a license such as the one granted in the contract, and that a license without a copyright presents a "real business problem," since the license cannot prove to a sublicensee or an infringer that it owns any rights. Appellant concludes that the May 1991 contract is incomplete, and cannot be enforced.

Appellant cites no authority which holds, as appellant suggests, that a work which not yet copyrighted cannot be licensed. The trial court finding that the contract was sufficiently definite is based on substantial evidence. We see no factual or legal basis for appellant's argument, and no error in the trial court ruling.

In a related argument, appellant argues that the May 1991 agreement is unenforceable because there was no meeting of the minds, as evidenced by the differing testimony on the meaning of the term "TBA." Appellant cites in support Jovy's testimony that

he understood the term to mean "to be approved" and that he was told by respondent that appellant had the right to reject any of the six films. Appellant ignores the fact that the trial court *disbelieved* Jovy's testimony, finding that "the Court believes the testimony of Daniel Marquet that no such right was given and disbelieves the contrary testimony of Dr. Herbert Jovy. Moreover, the conduct of [appellant] was inconsistent with it having been given the right to approve or reject films. For example, [appellant] wrote numerous letters to TMG with respect to the contract but never expressly mentioned such a right." Appellant has done no more than argue that the evidence which the court relied on was controverted, and as we have seen, appellant cannot prevail on such an argument.

Appellant also argues that the integration clause in the contract means that all the parol evidence on this subject should be ignored, that without parol evidence "TBA" is undefined, and that since the term is undefined there was no meeting of the minds and the contract is unenforceable. The parol evidence rule does prohibit the introduction of evidence to explain an intrinsic ambiguity. (Code Civ. Proc., § 1856 subd. (G); *General Motors Corp.* v. *Superior Court* (1993) 12 Cal.App.4th 435, 441.) We understand appellant to argue that "TBA" is such an ambiguity. We find no error in the trial court's ruling on parol evidence.

5. Mitigation of Damages

Respondents produced evidence, through the testimony of Peter Strauss, that in mitigation of damages on the October 1990 contract, they re-licensed German rights to "Bed and Breakfast" for $85,000. Respondents also produced evidence that they mitigated damages on the May 1991 contract by licensing four of the films for a period of three years, and that the value of additional licenses was highly speculative.

Appellant argues that it was entitled to an additional offset of $100,000 on the 1990 contract, since respondents actually received, or could have received, $180,000 for the re-license. Appellant asserts that this is established by an October 20, 1992, letter from respondents to appellant which contains the statement that "we have received an offer for Bed and Breakfast. . . in the amount of DM 280,000," and by a statement in the joint status conference report in the TMG-VCL litigation. The letter does not establish that respondents received $180,000 for the rights, or that they could have done so, but only that such an amount was discussed. The status conference report was not introduced into evidence, since it was not on appellant's exhibit list, but respondents did not object to appellant using the document to cross-examine Strauss. The evidence on this point is: "Q: What this shows . . . is that VCL would pay 280,00 D marks upon acceptance of 'Bed and Breakfast' by the licensee; is that correct?" "A: No. I don't believe that's what it says at all."

Appellant also argues that respondents failed to mitigate because they did not make any effort to re-license the October 1990 films for the last five years of the contract, but presented no evidence that respondents could have licenses those films for that period.

As to the May 1991 contract, appellant argues that it is entitled to an unspecified credit, for the last eight years of the license, and that respondents' other efforts to mitigate damages, a license of two of the films to Twentieth Century Fox, were inadequate.

The settled rule of law on mitigation of damages is that a plaintiff cannot recover for harm which could have been avoided with reasonable effort and without undue expense, but that "[t]he burden of proving that losses could have been avoided by reasonable effort and expense must always be borne by the party

who has broken the contract." (*Brandon & Tibbs* v. *George Kevorkian Accountancy Corp.* (1990) 226 Cal.App.3d 442, 460.) Appellant did not carry this burden at trial, and has not established that the trial court erred in the damage award.[7]

Disposition

The judgment is affirmed. Respondents' request for costs on appeal is granted. Respondents' requests for attorney's fees on appeal is denied.

NOT TO BE PUBLISHED.

ARMSTRONG, J.

We concur:

TURNER, P.J.

GODOY PEREZ, J.

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[7]In its reply brief, appellant contends that under *Vitagraph, Inc.* v. *Liberty Theatres Co. of California* (1925) 197 Cal. 694, respondents cannot recover under the May 1991 agreement for the two films which were produced after the agreement was canceled. There is no showing that the argument was raised in the trial court. We do not consider if for the first time on appeal. (*In re Estate of Westerman* (1968) 68 Cal.2d 267, 278.)

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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

THE MOVIE GROUP, INC. and INTERNATIONAL MOVIE GROUP (CANADA) INC. (formerly known as International Movie Group Inc., Plaintiffs, v. TT TELEFILM GMBH (formerly known as TT Telefilm GmbH & Co. and TT Telefilm GmbH & Co. Communication KG; and DOES 1 through 25, inclusive, Defendants	)	CASE NO. BC 066 615
	)	[Assigned for All Purposes to Hon. Edward Y. Kakita]
	)	DEPARTMENT 14
	)	STATEMENT OF DECISION
AND RELATED CROSS ACTION	)	

This case was tried on October 11, 12, 16, 17, 18, 19, 23, 24, 25, 26, and November 6, 1995, in Department 14 of the above-entitled Court, the Honorable Edward Y. Kakita, judge presiding. The case was tried to the Court, jury trial having been waived. Plaintiffs, The Movie Group, Inc. ("TMG") and International Movie Group (Canada) Inc. (formerly known as International Movie Group, Inc. and referred to hereinafter as "IMG") were represented by Charles N. Shephard of Greenberg, Glusker, Fields, Claman & Machtinger. Defendant, TT Telefilm GmbH (formerly known as TT Telefilm Gmbh & Co. and TT Telefilm GmbH &Co. Communication KG, and referred to hereinafter as "TT Telefilm"), was represented by J. Lawrence Blades, Richard I. Chaifetz, and William H. Shibley.

Having considered the evidence, as well as oral and written argument, the Court has ruled in favor of plaintiffs in connection with the first, second, and fourth causes of action of their First Amended Complaint. (The third cause of action was voluntarily dismissed upon the commencement of trial). The Court has further ruled that defendant take nothing by reason of its Cross-Complaint.

The reasons for the Court's rulings are as follows:

A. The Parties.

TMG and IMG are motion picture distributors. At the time of the events in question, IMG was the parent of TMG. The chief executive officer of each company has at all times been Peter Strauss. In the normal course of their business, TMG and IMG acquired motion picture distribution rights from various production entities. Thereafter, TMG and IMG entered into contracts with foreign subdistributors for the distribution of the motion pictures in foreign territories. There was an agreement in effect between IMG and TMG pursuant to which each could deal

in and act as agent for the other in connection with the motion picture distribution rights which they respectively acquired. The decision as to whether motion picture distribution rights would be licensed to subdistributors in the name of IMG or TMG was based upon internal tax and financial considerations. Although one of the contracts which is at issue was in the name of IMG and one of the contracts which is at issue was in the name of TMG, there is no need to view them separately for purposes of this proceeding.

TT Telefilm is a German motion picture distributor. In the normal course of its business it licensed motion picture distribution rights from other distributors (such as TMG or IMG) and then licensed those rights to German video companies and television stations. On occasion TT Telefilm utilized a sister company, TSC Communications, to license the rights which it received from IMG.

The representatives of TMG and IMG (Peter Strauss and Daniel Marquet) and the representative of TT Telefilm (Dr. Herbert Jovy) who were involved in the events which are at issue were extremely experienced in the motion picture distribution business.

B. Plaintiff's First Amended Complaint.

1. First Cause of Action

The subject of the first cause of action of Plaintiffs' First Amended Complaint is a written contract between IMG and TT Telefilm dated as of October 12, 1990. (Exh. 4.) The contract required TT Telefilm to pay IMG $880,000 for the right to distribute four motion pictures on television in certain German speaking territories in Europe. The motion pictures were "Best of the Best", "Perfume of the Cyclone", "Buried Alive", and "Bed

and Breakfast". Mr. Strauss' testimony established that IMG performed each of the obligations which were required of it under the contract. Physical film materials for each of the four films were delivered to TT Telefilm in a timely manner in conformity with the custom and practice of the motion picture industry. To the extent that there were problems with the initial physical materials provided by IMG, such problems were within the norm of what can be expected when physical film materials are delivered and all such problems were timely cured in a sufficient manner so that all four films were capable of being broadcast on German television. There has been no material (or any other) breach of contract by IMG. There is therefore no justification for TT Telefilm not to have paid the full contract price. The amount unpaid on the contract as of June 1992 was $386,000. This sum has never been paid. Because TMG eventually mitigated its damages by the sum of $84,917, the amount owing to IMG is $301,083, plus interest on the unpaid sums.

None of the reasons advanced by TT Telefilm justify its nonpayment of the sum which was owed as of June 1992. Mr. Strauss testified that the custom and practice in the industry,for contracts for the distribution of motion pictures which are already completed, is that physical film materials are delivered by the licensor when requested by the licensee. IMG provided physical film materials to TT Telefilm in a timely fashion,given the custom and practice of the industry, promptly after TT Telefilm advised IMG that the materials were needed. IMG had no reason to know that TT Telefilm needed the physical film materials any earlier than such time as they were requested by TT Telefilm. [1]

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1 It should also be noted that paragraph 4(A) of the contract provided that IMG was to be informed by TT Telefilm of all material terms of all television licenses made by TT Telefilm with respect to the subject films. TT Telefilm, however,

Special mention needs to be made concerning the motion pictures "Buried Alive" and "Bed and Breakfast".

"Buried Alive" was a horror motion picture. Dr. Jovy admitted that the motion picture was viewed by TT Telefilm before it agreed to license it and that TT Telefilm was aware at that time that the motion picture might be subject to being "indexed" in Germany. There was no evidence presented that, prior to or at the time of the execution of the contract, IMG promised to discount the price of "Buried Alive" in the event that there would be indexing of the film in the future. Even if such a promise had been made, it would be unenforceable as a result of the parol evidence rule and paragraph 12(I) of the contract. The Court does not believe that after the execution of the contract IMG made any representations or promises to TT Telefilm that it would reduce the price of the film. Moreover, any such oral representations or promises would be unenforceable pursuant to paragraph 12(I) of the contract. Although TT Telefilm did make requests of IMG to reduce the price of "Buried Alive" during 1992 because of the index situation which had arisen and the editing which occurred, IMG never agreed to do so and had no contractual obligation to do so. Moreover, TT Telefilm was not being candid with IMG when it was requesting a discount inasmuch as TT Telefilm purposefully and intentionally failed to advise IMG that TT Telefilm had already licensed "Buried Alive" for the sum of 290,000 deutsche marks in February 1992. This license fee was within the high range of the average price which theatrical motion pictures received when licensed in Germany. There is no justification for TT Telefilm's failure to have paid the

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failed to comply with its obligations under paragraph 4(A) to inform IMG of the material terms of its television licenses.

amount due on the contract.

As for the motion picture "Bed and Breakfast", the motion picture was eventually broadcast, with materials supplied by IMG, on pay television in Germany, on free television in Austria, and on free television in Germany. According to Mr. Strauss, the only materials which were available for the broadcast of this film were the materials provided by IMG. Accordingly, the physical materials provided by IMG must have been adequate for the broadcast of the motion picture on German television. Moreover, TT Telefilm did not provide any testimony from any television station representative that the quality of "Bed and Breakfast" was inadequate for broadcast in Germany.

The Court believes that TT Telefilm's claim to IMG that the physical quality of "Bed and Breakfast" made it "unacceptable" for broadcast in Germany was false and was made by TT Telefilm in order to try to improperly and without justification induce IMG to provide TT Telefilm with a discount in connection with the license fee for this film. [2] IMG had no obligation to provide a discount to TT Telefilm and there is nothing about the delivery or technical quality of "Bed and Breakfast" which justifies TT Telefilm's failure to pay IMG the license fee called for by the contract.

It is also noted that in October 1992, when TT Telefilm improperly tried to terminate the parties' contract dated as of May 12, 1991 (see section B(2) infra), TT Telefilm asked TMG to allocate the $350,000 which had been paid on that contract to TT Telefilm's outstanding obligation under the contract dated as

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[2]Once again, when doing so, TT Telefilm failed to inform IMG about the licenses which it had made for the film, thereby violating paragraph 4(A) of the contract.

of October 12, 1990. This reflects an acknowledgment by TT Telefilm that it was indebted to IMG on this contract and that it did not perceive IMG to be in breach thereof.

Finally, the Court observes that the sole witness called by TT Telefilm, Dr. Herbert Jovy, was not credible. He gave contradictory testimony, his testimony was inconsistent with the documents which were introduced into evidence and he was generally not believable.

2. Second Cause of Action.

The subject of the second cause of action of plaintiffs' First Amended Complaint, is a written contract between TMG and TT Telefilm dated as of May 12, 1991. (Exh. 6.) The contract required TT Telefilm to pay TMG $1,500,000 for the right to distribute six motion pictures in certain German speaking territories in Europe. The subject matter of this contract was a second package of six romantic comedies which were produced by Chrysalide Films ("Chrysalide") (in conjunction with TMG and Canal Plus).

Mr. Strauss and Mr. Marquet testified that in the early 1990s, Chrysalide (in conjunction with TMG and Canal Plus) produced a package of six romantic comedy motion pictures. The motion pictures were shot in Europe, using American actors, and had certain specified budgets. This package of six romantic comedies was successfully licensed in many territories around the world. Among these was a sale of the package to TT Telefilm. (Exh. 2.) Based upon the success of the first package of six romantic comedies, Chrysalide (in conjunction with TMG and Canada Plus) agreed in early 1991 to produce a second package of six romantic comedies. The basic structure of the package was to be the same as the first -- i.e., the motion pictures would be shot in Europe, would feature American actors, and would have

budgets approximately 10% higher than the budget of the films in the first package. TMG began advertising the second package of six romantic comedies in the spring of 1991. (Exh. 19.) The films were offered on a "presale" basis, i.e., the motion pictures would be licensed before they were produced.

Mr. Strauss testified that presales are a common way in which motion pictures are licensed to the international marketplace. In part, presales are a financing technique which assures the producer that it will received a certain minimum sum of money for the motion pictures which it will be producing. This helps defer the cost of producing the motion pictures and reduces the risk inherent in producing motion pictures.

TMG informed TT Telefilm about the second package of six romantic comedies during the spring of 1991. The parties entered into an agreement at the Cannes Film Festival, in May 1991, pursuant to which TT Telefilm agreed to license this package of six films. The parties signed a deal memo in May 1991 (Exh. 5) and a long form contract in June 1991 (Exh. 6). Upon signing the long form contract, TT Telefilm paid TMG $150,000. Later TT Telefilm paid TMG an additional $200,000. These events would not have occurred if the parties had not made a binding agreement.

The parties knew and understood that the subject matter of the contract was the second package of six romantic comedies to be produced by Chrysalide, and that TT Telefilm was obligated to accept delivery of each of the six films which would be produced as part of that package.

The Court does not accept TT Telefilm's argument that the contract was an "agreement to agree" or that the contract was too uncertain to be enforced. The parties knew what was being licensed -- distribution rights to the six motion pictures which

would be produced by Chrysalide in its second package of romantic comedies. Such an agreement, given the custom and practice of the motion picture industry, is sufficiently certain to be enforced. Motion pictures are often sold or licensed before they are identified. Moreover, there was nothing to be agreed upon in the future. TT Telefilm was required to accept each of the six motion pictures which were produced by Chrysalide in the second package of romantic comedies.

The reference to "TBA" in the long-form version of the contract (as well as in the deal memorandum which preceded it) means "to be announced". Mr. Strauss testified that this is the customary definition of the term in the motion picture industry. No contrary testimony was provided.

TMG complied with its obligations under the contract. Chrysalide produced the six films and the six films were made available by TMG to TT Telefilm. TMG was not in material breach of any of its obligations under the contract. There was no justification for TT Telefilm not to accept delivery of the films and there was no justification for it not to have paid the balance of the sums which were due pursuant to the contract.

The "delivery" and/or "availability" dates specified at page 20 of the contract were, given the custom and practice of the industry, estimates only. Even if they were not estimates, the failure to have delivered the films by the specified dates does not excuse TT Telefilm's obligation to pay TMG. This is because there is no indication on the face of the contract that time was of the essence, nor is there any indication from the conduct of the parties that the time for delivery or availability was of any material concern to anyone. To the contrary, the parties' conduct clearly demonstrates that the dates specified at page 20 were not significant or important. In this regard, TT Telefilm never complained or protested when the delivery and availability dates

came without the films being delivered or made available. Moreover, TT Telefilm continued to make additional payments to TMG even after many of the delivery dates had passed. Thus even if the failure to provide the films by these dates was a breach, it was a non-material breach. Further, until such time as TT Telefilm made the final payments specified in paragraph 1(f)(ii)(C) of the contract, TMG had no obligation to deliver films to TT Telefilm. TT Telefilm never made these payments.

TMG did not grant TT Telefilm a right to approve or reject any or all of the six films. No such right is specified in the deal memo or the written contract. The Court believes the testimony of Daniel Marquet that no such right was given and disbelieves the contrary testimony of Dr. Herbert Jovy. Moreover, the conduct of TT Telefilm was inconsistent with it having been given the right to approve or reject films. For example, TT Telefilm wrote numerous letters to TMG with respect to the contract but never expressly mentioned such a right.

Similarly, TMG did not represent to TT Telefilm that it would have the right to participate in decisions relating to the script and casting of the six motion pictures. Even if such a representation had been made, it would be unenforceable due to the parol evidence rule and/or ¶16(I) of the contract.

The Court finds that the letter of October 6, 1991 (Exh. 241) by which TT Telefilm attempted to terminate the contract was ineffective and, in fact, constituted a repudiation of the contract by TT Telefilm. The letter contained numerous false statements which were tendered by TT Telefilm as an excuse for trying to avoid its contractual obligation to TMG. These included the suggestion that Dr. Jovy was not authorized to sign the contract, the assertion that Dr. Jovy signed the contract at a time when he "had no opportunity to get in touch with [his son]",

and the claim that delivery dates were of "fundamental importance" to TT Telefilm and, if not met, made its investments "worthless". These statements were demonstrably false. The Court believes that Exh. 241 was a pretext designed by TT Telefilm to try escape its contractual obligation to TMG when it had no justification for doing so.

The fact that the October 6, 1992 letter contained false statements as to why TT Telefilm claimed it was not obligated on the contract and the fact that the letter failed to recite the primary ground now urged by TT Telefilm as to why it is not obligated on the contract (i.e., the purported right to approve and reject individual films) adversely affects the credibility of TT Telefilm and strengthens the Court's conclusion that TT Telefilm is simply fabricating excuses as to why it is not bound by the contract.

The Court believes that TT Telefilm entered into this contract fully aware of what it was acquiring. It did so based upon the success of the first package of romantic comedies which were produced by Chrysalide and which it had licensed. It further did so because it did not want its competitor (VCL) to receive the rights and because it had a standard of protection in that the motion pictures would, at a minimum, satisfy the standards of Canal Plus for its premium pay television operation in France. Mr. Strauss testified (and this was confirmed in part by Dr. Jovy) that, subsequent to the contract being entered into, the market in Germany for motion pictures of this sort was in decline. In the face of this declining market, TT Telefilm made efforts to try to sell German companies one or more of the films which it acquired as part of this package. When TT Telefilm determined that it was unable to obtain prices at the level which it had initially hoped to achieve, it tried to renegotiate the deal. When that failed, TT Telefilm attempted to terminate the contract (although as indicated above, there was no justification for it doing so).

Finally, once again the Court feels compelled to comment upon the credibility of the witnesses in connection with this contract. TT Telefilm's sole witness, Dr. Herbert Jovy, was not credible. His trial testimony was inconsistent with his deposition testimony, he frequently failed to respond to questions, his testimony was inconsistent with his conduct, and his testimony was inconsistent with the manner in which TT Telefilm conducted its business. By way of example, TT Telefilm extensively reviewed each of the two long-form contracts which were submitted to it by IMG/TMG in connection with the parties' other contracts and TT Telefilm requested numerous changes to the content of those documents. (Exhs. 261 and 16.) It is not at all believable that TT Telefilm would not have carefully reviewed this contract and would not have requested changes to the form of the contract if it did not clearly and unambiguously reflect the parties' agreement.

As a consequence of TT Telefilm's breach of this contract, TMG has been damaged in the amount of $1,150,000 (the difference between the contract price of $1,500,000 and the sum of $350,000 which was paid by TT Telefilm). As a result of TMG's mitigation efforts (which yielded $300,000 to TMG) the amount owing to TMG is $850,000, plus interest on the unpaid sums.

3. Fourth Cause of Action

With respect to the fourth cause of action of plaintiffs' First Amended Complaint (for declaratory relief), as of June 1992, TT Telefilm owed IMG $386,000 in connection with the October 12, 1990 contract. IMG was justified in giving TT Telefilm ten days' notice within which to cure its breach of contract pursuant to paragraph 11(A) of the contract. Because TT Telefilm did not pay any of the money which was owed in response to the 10-day notice, IMG acted properly and

permissibly on November 3, 1992 when it terminated the contract. As a consequence of that termination, the Court declares that as of November 3, 1992 TT Telefilm had no further rights in connection with the four motion pictures covered by that contract.

C. Defendant's Cross-Complaint.

As for TT Telefilm's cross-complaint, the Court finds that no relief is to be awarded. With respect to the first and second causes of action, the written contract dated as of May 12, 1991 had no provision giving TT Telefilm the right to participate in decisions relating to the cast, storyline, or other creative elements of the motion pictures. Nor does the contract give TT Telefilm the right to approve or reject any or all of the motion pictures which are included within the contract. Further, the Court does not believe that TMG made such promises to TT Telefilm in advance of the contract being made. In this regard, the Court repeats its prior observation concerning the credibility of Dr. Herbert Jovy and incorporates by reference its discussion in section B(2) supra.

With respect to the third cause of action of the cross-complaint, TT Telefilm did not properly rescind or terminate the May 12, 1991 contract for the reasons stated in section B(2), supra. Nor was this contract an unenforceable agreement to agree. There was a meeting of the minds on all material terms. In particular, the subject matter of this contract was the second group of six romantic comedies to be produced by Chrysalide. The $350,000 paid by TT Telefilm in connection with that contract is not refundable to TT Telefilm and it is not entitled to credit the payment of that amount to sums it owed on other contracts.

The Court further finds, with respect to the third cause of

action, that TT Telefilm did not perform pursuant to the agreement of October 12, 1990 because it did not pay sums which were owed to IMG. IMG did not breach that agreement and the Court incorporates by reference its discussion in section B(1) supra. As previously stated, IMG delivered physical materials to TT Telefilm at its request, in a timely manner, consistent with the custom and practice of the motion picture industry. To the extent that inadequate physical materials were delivered, this was within the norm to be expected within the motion picture industry and all problems were timely cured such that each of the motion pictures could be broadcast on German television. In particular, adequate materials were delivered by IMG to TT Telefilm prior to the time that TT Telefilm's sublicensees ever had the right to televise the motion pictures themselves.

For each of the foregoing reasons, the Court finds that judgment should be awarded in favor of plaintiffs in connection with their First Amended Complaint and that defendant should take nothing by reason of its Cross-Complaint.

DATED: _____, 1995.

/EDWARD Y. KAKITA/

Edward Y. Kakita, Judge
Los Angeles Superior Court

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Group, Inc.)

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

THE MOVIE GROUP, INC. and INTERNATIONAL MOVIE GROUP (CANADA) INC. (formerly known as International Movie Group Inc., Plaintiffs, v. TT TELEFILM GMBH (formerly known as TT Telefilm GmbH & Co. and TT Telefilm GmbH & Co. Communication KG; and DOES 1 through 25, inclusive, Defendants AND RELATED CROSS ACTION.	)	CASE NO. BC 066 615
	)	[Assigned for All Purposes to Hon. Edward Y. Kakita]
	)	DEPARTMENT 14
	)	JUDGMENT

This action came on regularly for trial on October 1, 1995 and was tried on October 11, 12, 16, 17, 18, 19, 23, 24, 25, 26,and on November 6, 1995 in Department 14 of the above-entitled Court, the Honorable Edward Y. Kakita, judge presiding. Plaintiffs, The Movie Group, Inc. ("TMG") and International Movie Group (Canada) Inc. (formerly known as International Movie Group, Inc.) ("IMG"), were represented by Charles N. Shephard of Greenberg, Glusker, Fields, Claman & Machtinger. Defendant, TT Telefilm GmbH (formerly known as TT Telefilm GmbH & Co. and TT Telefilm GmbH & Co. Communication KG) was represented by J. Lawrence Blades, Richard I. Chaifetz, and William H. Shibley.

The matter was tried before the Court, sitting without a jury. The Court heard testimony from live witnesses and through deposition, received documents into evidence, read the briefs submitted by the parties, and heard the argument of counsel. The Court having considered the matter,

IT IS HEREBY ADJUDGED, ORDERED AND DECREED that judgment be entered in favor of plaintiffs TMG and IMG, against defendant TT Telefilm GmbH (referred to hereinafter as "TT Telefilm"), as follows:

1. In connection with the First Cause of Action of plaintiffs' First Amended Complaint, IMG shall recover from TT Telefilm the sum of $301,083, plus pre-judgment interest in the amount of $116,568;

2. In connection with the Second Cause of Action of plaintiffs' First Amended Complaint, TMG shall recover from TT Telefilm the sum of $850,000, plus pre-judgment interest in the amount of $267,753;

3. In connection with the Fourth Cause of Action of plaintiffs' First Amended Complaint it is hereby declared that IMG properly terminated that agreement between IMG and TT Telefilm dated as of October 12, 1990, that the termination of was effective as of November 3, 1992 and, that from November 3, 1992, TT Telefilm had no further right or interest in any of the four motion pictures licensed by the October 12, 1990 agreement -- i.e., "Best of the Best", "Perfume of the Cyclone", "Buried Alive" and "Bed and Breakfast";

4. TT Telefilm shall take nothing by reason of its cross-complaint;

5. IMG shall recover from TT Telefilm attorney's fees in the amount of $_____;

6. TMG shall recover from TT Telefilm attorney's fees in the amount of $_____;

7. IMG shall recover from TT Telefilm its costs of suit incurred herein in the amount of $_____; and

8. TMG shall recover from TT Telefilm its costs of suit incurred herein in the amount of $_____.

DATED: /DEC 01 1995/, 1995

/EDWARD Y. KAKITA/

Edward Y. Kakita, Judge
Los Angeles Superior Court

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Group, Inc.)

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

THE MOVIE GROUP, INC. and	)	CASE
	)	NO. BC
	)	066 615
INTERNATIONAL MOVIE	)	
GROUP (CANADA) INC.	)	[Assigned
(formerly known as International	)	for All
Movie Group Inc.,	)	Purposes
Plaintiffs,	)	to Hon.
	)	Edward Y.
v.	)	Kakita]
	)	
TT TELEFILM GMBH (formerly	)	DEPARTMENT
known as TT Telefilm GmbH &	)	14
Co. and TT Telefilm GmbH &	)	NOTICE OF
Co. Communication KG; and	)	ENTRY OF
DOES 1 through 25, inclusive,	)	JUDGMENT
Defendants	)	
	)	
AND RELATED CROSS ACTION .	)	

TO TT TELEFILM AND TO ITS COUNSEL OF RECORD:

NOTICE IS HEREBY GIVEN that judgment in this action was entered by the Court on December 1, 1995.

A true and correct copy of the Judgment is attached hereto as Exhibit "A".

DATED: December 15, 1995

GREENBERG, GLUSKER, FIELDS,
CLAMAN & MACHTINGER

By: /Charles N. Shephard/
Charles N. Shephard
Attorneys for Plaintiffs and
Cross-Defendants The Movie
Group, Inc., and International
Movie Group (Canada) Inc.
(formerly known as
International Movie Group,
Inc.)